

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

UNITED STATES OF AMERICA

v.

CRIMINAL NO.: 2:21-cr-141

KEVIN ANDREW STATON,

Defendant.

**POSITION OF DEFENDANT WITH RESPECT TO SENTENCING FACTORS
AND MOTION FOR DOWNWARD DEPARTURE PURSUANT TO SECTION 5H1.4 OF
THE UNITED STATES SENTENCING GUIDELINES**

NOW COMES the Defendant, Kevin Andrew Staton, by and through counsel, pursuant to Section 6A1.2 of the United States Sentencing Guidelines and the Court's policy regarding guidelines sentencing, and adopts the findings in the Probation Officer's Presentence Investigation Report, dated March 07, 2022, with the following discussion:

1. Staton has been placed in a criminal history category one (I) by virtue of the fact that his criminal history score is zero.

DEPARTURE

2. Staton has been diagnosed with morbid obesity, hypertension, pre-diabetes, severe sleep apnea, and asthma, which increase his susceptibility to death and/or severe illness should he contract COVID-19 during the term of any incarceration. (*See* Presentence Investigation Report, ¶ 39, p. 12-13). It can be difficult, if not impossible, to eliminate or contain the spread of COVID-19 in the Bureau of Prisons setting. As both Dr. Gresens and Dr. Tucker state in the letters attached hereto, an active sentence of incarceration will significantly affect Staton's health, including a much higher incidence of complications, which could result in death, should Staton contract COVID-19 during any active term of incarceration.

The contagion and risks associated with COVID-19 continue to be much worse within the confined populations in the Bureau of Prisons' facilities than in the general population.¹

Congress passed the First Step Act permitting a sentencing court to modify an imposed term of imprisonment for "extraordinary and compelling reasons" warranting reduction pursuant to 18 U.S.C. § 3582 (c)(1)(A)(i). Staton's medical conditions, as will be evidenced by his current treating physician's opinions, constitute such extraordinary and compelling reasons to permit this Court to depart from the guidelines pursuant to § 5H1.4. Specifically, § 5H1.4 permits a departure for "extraordinary physical impairment" where "home detention may be as efficient as, and less costly, than imprisonment." *See* § 5H1.4 (Policy Statement, ¶ 1). This Court has recognized this issue in authorizing the early release of similarly situated individuals.² *See also* § 5H1.4 (Physical condition may warrant departure).

3. Additionally, Staton is scheduled to have gastric bypass surgery in May of this year. The surgery will be performed by Dr. Anjali Gresens at Sentara Norfolk General Hospital. Dr. Gresens has found the surgery to be medically necessary. *See* § 5H1.4 *supra*.

4. There remains no unresolved objections to the Presentence Report as reported by United States Probation Officer, Jeffrey Noll, in the Addendum to the Presentence Report dated March 7, 2022. The parties agree to Staton's criminal history computation of 0; total offense level 21, with a guideline range of 37-46 months.

¹ As of April 19, 2022, the Federal Bureau of Prisons reports having 54 federal inmates who have confirmed positive test results for COVID-19 nationwide; 52,880 federal inmates have contracted the virus while in BOP custody; and 293 federal inmates have died from COVID-19 while in BOP custody. *See* Fed. Bur. of Prisons, *COVID-19 Coronavirus: COVID-19 Cases*, <https://www.bop.gov/coronavirus/>.

² Counsel refers this Honorable Court to the decision entered in the matter of *Joshua Lee Gilson v. United States of America*, 2:18-cr-4, ECF No. 54 (E.D. Va. Sep. 30, 2020), where Judge Jackson of this Court granted compassionate release to a similarly situated Petitioner. Gilson, who was 41 years of age, suffers from obesity, a BMI over 40, type 2 diabetes, hypertension, and asthma. The Court reduced Gilson's time from his original sentence of 144 months to time served and placed him on supervised release and home confinement for a period of six (6) months.

5. Defendant Staton attaches sixteen (16) character letters hereto evidencing his support in the community.

Conclusion

The Defendant, Kevin Andrew Staton, requests that the Court take into consideration his lack of any criminal history and his significant physical impairments when exercising its discretion as to whether to apply § 5H1.4 of the Sentencing Guidelines to the ultimate sentence it imposes. Staton's medical diagnoses make him significantly more vulnerable to the debilitating effects of COVID-19 in the Bureau of Prisons than the average incarcerated inmate absent these recognized conditions. Accordingly, a sentence below the calculated guideline range, with a possible sentence of Home Electronic Monitoring and/or a sentence to a halfway house, should the Court consider granting either a downward departure or variance, satisfies the most compelling interest of 18 U.S.C. 3553(a), which mandates the imposition of a sentence sufficient, but not greater than necessary, to punish this Defendant while promoting respect for this Nation's Laws.

Respectfully Submitted,
KEVIN ANDREW STATON
BY: _____ /s/
Jon M. Babineau, Esq., VA State Bar No. 27461
Attorney for the Defendant, Kevin Andrew Staton
JON M. BABINEAU, PC
150 Boush Street, Suite 601
Norfolk, Virginia 23510
Phone: (757) 622-8631
Fax: (757) 227-5901
jon@babineaulaw.com

/s/
Edward A. Fiorella, Jr., Esq., VA State Bar No. 26176
Attorney for the Defendant, Kevin Andrew Staton
Fraim & Fiorella, P.C.
150 Boush Street, Suite 601
Norfolk, Virginia 23510
Phone: (757)227-5900
Fax: (757) 227-5901
eafiorella@ff-legal.com

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2022, I caused a true and correct copy of the foregoing to be sent via email to the following:

Graham Stolle, Esquire
John F. Butler, Esquire
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757)441-3575

Jeffrey A. Noll
United States Probation Officer
Eastern District of Virginia
600 Granby Street, Suite 200
Norfolk, Virginia 23510
(757)223-4663

Respectfully Submitted,
KEVIN ANDREW STATON

BY: _____ /s/
Jon M. Babineau, Esq., VA State Bar No. 27461
Attorney for the Defendant, Kevin Andrew Staton
JON M. BABINEAU, PC
150 Boush Street, Suite 601
Norfolk, Virginia 23510
Phone: (757) 622-8631
Fax: (757) 227-5901
jon@babineaulaw.com

_____ /s/
Edward A. Fiorella, Jr., Esq., VA State Bar No. 26176
Attorney for the Defendant, Kevin Andrew Staton
Fraim & Fiorella, P.C.
150 Boush Street, Suite 601
Norfolk, Virginia 23510
Phone: (757)227-5900
Fax: (757) 227-5901
eafiorella@ff-legal.com